Supreme Court, U.S.
FILED

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No. 021491 APR 9 - 2003

In The

Supreme Court Of The United States

IN RE SALVATORE P.

MARGARET SMITH,

Petitioner,

v.

STATE OF CONNECTICUT; CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES; CHRISTINE RAGAGLIA, Commissioner Of The Connecticut Department of Children And Families,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Connecticut deprived the Petitioner of a "meaningful opportunity to be heard" and a right to present a defense on the merits under the Fourteenth Amendment, because the courts would not let the Petitioner open a default judgment terminating her parental rights, where Petitioner's inability to appear was due to duress, and where the default hearing was procedurally deficient, creating a high risk of an erroneous deprivation.

2. Whether state courts must apply the Due Process balancing test of *Lassiter v. Department of Social Services* and *Santosky v. Kramer*, not state statutory law, or the discretion of the trial court, where a parent challenges the sufficiency of state procedures for opening default judgments terminating a compelling liberty interest protected by the Fourteenth Amendment.

3. Whether state courts must conduct a factual hearing on a motion to open a default judgment terminating parental rights, because such a hearing is necessary to evaluate the merits of a parent's assertion that she was deprived of Due Process where her failure to appear was by no fault of her own, she had a defense on the merits, and she received inadequate procedural protections at the default hearing.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Connecticut Appellate Court (App., *infra*, 1a-9a) is reported at 74 Conn. App. 23 (2002). The original order of the Superior Court for Juvenile Matters (App., *infra*, 11a-19a), denying Petitioner's Motion To Open Judgment, is unreported.

JURISDICTION

The order of the trial court, denying Petitioner's Motion To Open Default Judgment, was entered October 24, 2001. The Appellate Court affirmed the trial court's judgment December 10, 2002. The highest court of the state denied Petitioner's request for discretionary review January 9, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., Amend. XIV, sec. 1.

STATEMENT OF THE CASE

The Connecticut Superior Court for Juvenile Matters terminated Petitioner's parental rights by default trial March 16, 2001. The State appointed counsel to represent the Petitioner, but Counsel had no contact with the Petitioner prior to or during trial. At the time of trial, no one knew of Petitioner's whereabouts.

The Petitioner, in fact, received no notice of the proceeding, nor did she appear at trial. Petitioner

claims that she was absent against her will in another state, without access to telephones or newspapers. Moreover, Petitioner never received notice from the State that her rights had been terminated by default. It was only upon returning to Connecticut in July 2001 that Petitioner learned of the termination, after contacting her Counsel to inquire about the well-being of her children.

Upon learning that the Petitioner's inability to appear was due to duress, Petitioner's Counsel filed a Motion To Open the default judgment August 24, 2001. The purpose of the Motion was to afford the Petitioner an opportunity to show that her inability to appear was because she was absent against her will in New Jersey.[1]

A finding of duress would have negated all three grounds on which Petitioner's rights were terminated. At the March hearing, the trial court had found by clear and convincing evidence that Petitioner's outstanding absence from Connecticut since 1999, and her failure to appear at trial, was proof of (1) abandonment, (2) a failure to rehabilitate, and (3) the absence of an ongoing

---

[1] The exact circumstances of Petitioner's absence are still unknown and need to come out at a hearing. However, Petitioner has been prepared to testify since July 2001 that she did not willfully abandon her children. She left the state because an ex-boyfriend in New Haven, with gang connections, had hired goons to follow her and make sure she refrained from romantic liaisons with other men. His oppressive control resulted in the use of cronies to screen Petitioner's mail and phone calls, including correspondence from the Department of Children and Families. After having her life threatened, Petitioner fled to New Jersey with a friend, where she remained from 1999 until 2001, when she discovered that the ex-boyfriend left Connecticut. She made little to no contact with anyone in Connecticut during that time, out of fear that her boyfriend would learn of her whereabouts and kill her.

relationship with her children. *See* The Trial Court's Memorandum Of Decision (App., *infra*, 20a-31a).

A. The Motion to Open the Default Judgment

The Petitioner filed a Motion To Open And Vacate The Judgment August 24, 2001. The essence of her Federal claim was that she had a right to a "meaningful opportunity to be heard" under the Fourteenth Amendment that allowed her to open the judgment, and put on evidence of duress, in order to refute the trial court's findings. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). *See also Klapprott v. United States*, 335 U.S. 601, 613-14 (1949).

Under Connecticut Practice Book § 5-2, an issue is properly presented to a trial court, and preserved for appeal, if raised on the record or in a written trial brief. Petitioner's counsel sought to raise the Fourteenth Amendment claim at the oral argument on the motion, October 15, 2001.[2] It was evident, however, that the trial court was not interested in entertaining Petitioner's Federal rights, or her claim of duress generally:

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[2] The presentment of a Federal claim, for purposes of the Supreme Court's jurisdiction under 28 U.S.C. § 1257 (a), is proper where a party seeking review from the judgment of a state court raises the issue in a time and in a manner required by state law, or where the record reflects an express or clear intendment to raise a federal claim. *See Adams v. Robertson*, 520 U.S. 83, 87 (1997); *Street v. New York*, 394 U.S. 576, 584 (1969).

The Petitioner presented her Federal Due Process claim in writing to the Appellate Court. *See* Statement Of The Case *infra*. Petitioner's counsel also sought at all times to raise the claim at oral argument before both the trial and appellate courts, only to have the courts ignore the claim altogether. *See* Statement Of The Case *infra*.

[From the Motion to Open, Oct. 15, 2001]:

MR. ONETO: In my client's case, she had signed an affidavit that's attached to my motion, that clearly indicates that she feared for her safety while she was here. She left the jurisdiction before service of the TPR petitions, which was done by publication. . . . The case of *In re Baby B*[3] I think clearly sets out the parameters for the exercise of judicial authority, that is above and beyond. . . . [interrupted by trial court]

THE COURT: Attorney, we don't need to deal with -- I -- I understand it's purely within the Court's discretion. What you have to convince me is why I should exercise my discretion, based on the amount of time and effort that this court put into moving to a final judgment on this case.

* * * *

MR ONETO: Well, Your Honor, my client was clearly bonded with her children. She did not have the opportunity to show that. I did not have her assistance with me in order to cross-examine witnesses or even present witnesses.

THE COURT: Through whose fault is that,

---

[3] *In re Baby Girl B.*, 224 Conn. 263 (1992), is a Connecticut Supreme Court case holding that the opening of a default judgment terminating parental rights is appropriate where the parent returns with a good excuse for failing to appear. Petitioner's Counsel wanted to discuss the Fourteenth-Amendment underpinnings of *Baby B.*, but the court interrupted him before he could discuss the case.

Attorney Oneto?

MR. ONETO: Well, that goes to the issue of duress, Your Honor. She had to leave the state. She could not be here because she feared for her life. Once that threat was over, she, in fact, did come back.

Your Honor, I was cross-examining the DCF worker Leonard. She was -- and I was eliciting testimony from her . . . that mother was under duress. She kept an apartment . . . [interrupted by the trial court]

THE COURT: Attorney Oneto, we'd have to go back to the transcript. But as I recall, I believe I struck a good portion of that testimony.

MR. ONETO: Exactly, Your Honor. That . . . . [interrupted by the trial court]

THE COURT: So that's not evidence in front of the court at this point.

* * * *

MR. ONETO: The issues . . . are factual issues that are necessary to be brought out at trial, which is why I asked for a new trial.

THE COURT: But, Attorney Oneto, everything in life has to begin and end. And your client was given an opportunity to present herself and to litigate the issues . . . . *She chose not to appear* [emphasis added]

MR. ONETO: But, Your Honor, she . . . . [interrupted by the trial court]

THE COURT: We litigated the issues.

MR ONETO: She -- she had no notice. She was in New Jersey. . . . [interrupted by the trial court]

THE COURT: She had notice via publication, which according to the statute is perfectly acceptable. . . . And *I will not reopen a judgment that has been fully and lengthily litigated because once again, on the 23rd hour, your client has decided to pop back into the picture.* [emphasis added]

[Motion to Waive Costs,[4] Nov. 15, 2001]:

THE COURT: Why don't you try to convince me [that the appeal] is not [frivolous]. Isn't that what the bottom line is?

MR. ONETO: Yes. Okay. . . . The state's parens patriae power is so strong that it negates and can negate parents' constitutional right to raise their own children. This is a liberty interest at stake. That liberty interest arises to the level that entitles my client to an appeal. . . . I have outlined six areas for the appeal . . . and one of them is an issue as a matter of law that I felt that she should have [been] granted the original motion.

---

[4] The Petitioner, an indigent, had to file a waiver of costs and fees with the trial court before she could appeal. In the motion to waive costs and fees, Petitioner cited her right under the Fourteenth Amendment to present evidence of duress. The trial court dismissed the appeal as frivolous and denied the waiver. The Connecticut Appellate Court granted the waiver of costs and fees January 10, 2002. The Appellate Court subsequently granted Petitioner's Motion for Review January 10, 2002.

THE COURT: The only issue before this court today is a waiver of fees and costs application on the court's denial of your motion to reopen a judgment. It's not an appeal on the underlying TPR.

MR. ONETO: The problem is, Your Honor, that until she surfaced I could not. . . . [interrupted by the trial court]

THE COURT: But that's not the point. The point is that this court is being asked to consider . . . a waiver of fees, so that you can take an appeal from a . . . discretionary decision, as you conceded, about reopening a judgment that was over 120 days old.

MR. ONETO: I believe that I did not concede that point. . . . Her affidavit in my motion addresses every ground for the termination. . . . If you deny this motion, she cannot take an appeal because she is indigent.

* * * *

MR. ONETO: [If an appeal is granted] I would be granted a new trial at which time she could then present her case and the case would be relitigated and I believe that her [duress] defense goes to all three grounds; which I believe is not frivolous.

THE COURT: The Department wants to be heard? [summarily ending the discussion]

B. Basis of Petitioner's Appeal from the Trial Court

The Petitioner filed a Motion For Review with the Connecticut Appellate Court November 23, 2001, which was granted by the Appellate Court January 10,

2002. In the motion, the Petitioner expressly asserted that the trial court's refusal to open the default judgment violated her Fourteenth Amendment rights: "Parental rights are a constitutional right [requiring the state to give the Petitioner] 'fundamentally fair' procedures . . . in a timely manner . . . *Santosky v. Kramer*, 455 U.S. 745 (1982)."

The Petitioner believed that the trial court improperly ruled on the Motion to Open for the following reasons: First, the trial court applied the wrong standard in ruling on the motion. The trial court believed it had absolute discretion in denying the motion.

> **[From the Motion to Open, Oct. 15, 2001]:**
>
> MR. ONETO: So the case of In re Baby B [224 Conn. 263, 280 (1992)] I think clearly sets out the parameters for the exercisement of judicial authority, that is above or beyond. . . . [interrupted by the trial judge]
>
> THE COURT: Attorney -- we don't need to deal with -- I -- I understand it's purely within the court's discretion. What you have to convince me is why I should exercise my discretion. . . .

As a matter of law, the trial court was incorrect. The proper standard should have been the *Mathews v. Eldridge* balancing test. 424 U.S. 319 (1976). *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Lassiter v. Dept. Social Services*, 452 U.S. 18, 27 (1981). *See also In re Baby Girl B.*, 224 Conn. 263, 280 (1992); *In re Shaquanna M.*, 61 Conn. App. 592, 600 (2001) (the trial court had no discretion in denying a parent's motion for continuance in the context of a parental rights termination, because "[t]he

abuse of discretion standard 'does not apply to . . . constitutional claims, which are reviewed de novo by the courts.'").

That standard would have required the trial court to balance the Petitioner's liberty interest in parenthood, against the interests of the state in protecting her children, under circumstances where the procedures used to terminate her rights did not create a high probability of an erroneous deprivation. *See Santosky, supra,* at 754; *Lassiter, supra,* at 27; *In re Baby Girl B., supra,* at 280. *See also Dept. of Social & Health Services v. Brown,* 62 Wash. App. 608, 615-16 (1991); *State Children Youth & Fam. Dept. v. Stella P.,* 127 N.M. 699, 704 (1999); *Juvenile Dept. of Multnomah County v. Kopp,* 180 Or. App. 566, 574-75 (2001).

The trial court's handling of the Motion To Open created an exceedingly high risk of an erroneous deprivation. Although the Petitioner was present at the oral argument on the Motion To Open, the trial court did not conduct a factual hearing to assess the merits of Petitioner's allegations of duress. Instead, the court supplied its own reasons as to why the Petitioner failed to appear, with no basis in fact:

> **[From the Motion To Open, Oct. 15, 2001]:**
>
> MR. ONETO: Your Honor, I was cross-examining the DCF worker Leonard. She was -- and I was eliciting from her the fact that . . . mother was under duress.
>
> THE COURT: . . . I believe I struck a good portion of that testimony.
>
> MR. ONETO: Exactly, Your Honor. . . . [interrupted by trial court]
>
> THE COURT: So that's not evidence in front

of the court at this point. Did your client ever ask the law enforcement for help? Did she ever ask for witness protection program? Did she ever to be taken into protective custody? Did she ever ask the State of Connecticut for help in keeping safe?

* * * *

THE COURT: [Y]our client was given an opportunity to present herself and to litigate the issues with her present. She chose not to appear.

MR ONETO: But, Your Honor, she. . . . [interrupted by the trial court]

THE COURT: We litigated the issues. . . . And I will not reopen a judgment that has been fully and lengthily litigated because, once again, on the 23rd hour your client has decided to pop back into the picture.

The trial court's questioning of the circumstances surrounding Petitioner's disappearance was unfounded, because it had no basis in fact. The trial court did not even consider the Petitioner's affidavit when it ruled on the motion. Opposing counsel had to point out the existence of Petitioner's affidavit to the court near the end of the proceeding. By that time, however, it was clear that the trial court was not interested in Petitioner's duress claim, or her Fourteenth Amendment right to present evidence:

[From the Motion To Open, Oct. 15, 2001]:

THE COURT: What do you want to say, Attorney Stoloff [attorney for the Department of Children and Families]?

MS. STOLOFF: . . . [I]n terms of the affidavit, the supporting affidavit that was prepared by the mother does not in any way shape or form explain why she wasn't able to even make a phone call to anybody, not to her mother, not to DCF, not to her cousin. . . .

THE COURT: But what affidavit are you referring to?

MS. STOLOFF: There is an affidavit that is attached to. . . .

MR ONETO: Attached to my motion, Your Honor. . . .

MS. STOLOFF: The motion to open judgment and vacate.

THE COURT: I guess I didn't get. . . .

MS. STOLOFF: [finishes her argument]

* * * *

THE COURT: Do you have any brief response, Attorney Oneto?

MR. ONETO: Yes, I do, Your Honor.

THE COURT: Brief.

The third deficiency in the trial court's ruling on the Motion To Open was the court's presumption that the Petitioner's failure to appear was deliberate and by her own fault, therefore amounting to a waiver of her right to be heard. *See State Children Youth & Fam. Dept. v. Stella P.*, 127 N.M. at 706 ("[W]e emphasize that waiver of fundamental rights [in parental rights termination cases involving default judgments] will not be presumed.").

[From the Motion To Open, Oct. 24, 2001]:

> MR. ONETO: [T]he issues . . . raised [with regard to the Petitioner's absence] . . . are factual issues that are necessary to be brought out at trial, which is why I asked for a new trial.
>
> THE COURT: But, Attorney Oneto, everything in life has to begin and end. And your client was given opportunity to present herself and to litigate the issues with her present. *She chose not to appear.* [emphasis added]

The fourth deficiency was that the *only* evidence supporting a termination of the Petitioner's parenthood was Petitioner's absence from the children's lives since 1999. *See* Trial Court's Memorandum Of Decision (App. 20a-31a *infra*). Evidence of abandonment and the lack of an ongoing parent-child relationship can no longer be clear and convincing once the Petitioner returned claiming that her absence was due to duress, or other circumstances beyond her control. *See Dept. Social & Health Services v. Brown*, 62 Wash. App. at 615-17; *Stella P.*, 127 N.M. at 707.

The fifth deficiency was the trial court's belief that the presence of state-appointed counsel, *per se*, was sufficient to protect the Petitioner's interests at trial. This assumption was unfounded where Petitioner's Counsel had no guidance in cross-examining the state's witnesses. The lack of meaningful contact between the Petitioner and her Counsel, both before and during trial, allowed for the creation of a dubious factual record, in which all the evidence supported the position of the State, without any challenge. *See Evitts v. Lucey*, 469 U.S. 395 (1985); *Brown*, 62 Wash. App. at 616.

The presence of counsel created the illusion of a contested hearing, but in reality served no meaningful function: Petitioner was a complete stranger to Counsel at the time of the hearing. Counsel had only talked briefly with the Petitioner twice, a year before the trial. There was no way for Petitioner's Counsel to prepare a defense, to cross-examine witnesses, or to introduce evidence on behalf of a client whose circumstances, interests, and whereabouts were unknown. *See Juvenile Dept. v. Kopp*, 180 Or. App. at 577-78.

C. Appellate Court's Treatment of the Federal Claim

It was Petitioner's contention that an opening of the judgment was necessary because the Petitioner's claim of duress called into question the validity of the trial court's finding of abandonment and lack of an ongoing relationship between Petitioner and her children. The trial court's refusal to permit a factual hearing on the duress claim created an impermissibly high risk of an erroneous deprivation of Petitioner's parenthood. *See Stella P.*, 127 N.M. at 704-05; *Kopp*, 180 Or. App. at 577-79.

It was Petitioner's hope that the Appellate Court would recognize her Fourteenth Amendment right to present a defense to the termination of her parenthood. However, at oral argument, September 9, 2002, it was evident that the Appellate Court was not interested in entertaining Petitioner's Federal claim.

The Appellate Court did not permit Petitioner's Counsel to undertake a discussion of Petitioner's Federal Due Process rights. Instead, the court seemed more interested in pointing out why Petitioner's Motion To Open was inherently deficient under state law, because Petitioner failed to present evidence of duress at the October 15 oral argument.

[At the Appellate Court, Sept. 9, 2002]:

JUDGE DRANGINIS: [I]t's my understanding, and correct me if I'm wrong, that at least a year earlier in October, I think October of 1999, she left her children and didn't tell anybody where she was. . . . And that she absented herself from the jurisdiction, didn't seek any kind of aid for herself or any protection from the State of Connecticut based upon this claim of her life being threatened by the people that she was hanging around with.

MR. ONETO: That is correct, Your Honor. However the reasons for the absence. . . . [interrupted by appellate court]

JUDGE DRANGINIS: So why should the children's rights to be cared for be compromised by her lack of action?

MR. ONETO: Because a [Connecticut General Statute §] 52-212 analysis does not take the best interest of the child into account. And that is an abuse of discretion. 52-212. . . . [interrupted by appellate court]

JUDGE DRANGINIS: So we just -- part of the court's discretion has nothing to do with what's happening to the children in the meantime? Is that what you're suggesting?

MR. ONETO: I'm suggesting. . . . [interrupted by the appellate court]

JUDGE DRANGINIS: And that this court should find that we disregard the children and we hone in on a *technical question* that she

just wasn't there and claimed duress, whether or not there was a valid showing that had any basis whatsoever, in fact. *And the children be damned.* Is that what you're suggesting to us?[5] [emphasis added]

MR. ONETO: Your Honor, I'm suggesting that my client has a fundamental constitutional interest that's protected. And the great body of Connecticut law and the Federal Constitution allows her to have an opportunity to be heard at a time and a location where she needs to be noticed. And that's not what happened. . . .

JUDGE FRIEDMAM: But it's in the discretion of the trial court. And the trial court exercises that discretion based on what's before it. What was before the trial court that would cause the trial court -- other than the assertion of counsel and a conclusory affidavit? There was no testimony whatsoever as to why she did not attend the hearing. There wasn't even testimony that she didn't get notice. There was no testimony.

MR. ONETO: Your Honor, that was the

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[5] The Petitioner's Fourteenth Amendment rights are not a "technical question," as the Appellate Court suggested. They are fundamental limitations on state power that require the courts to consider the Petitioner's compelling liberty interests against the state's interest in caring for children. The court's comment about "the children be damned" is a mischaracterization of the sophisticated legal analysis that the Petitioner's case requires under *Santosky*, *Lassiter*, and *Mathews*.

testimony that is required at trial. Those are facts that go to the heart of. . . . [interrupted by appellate court]

JUDGE FRIEDMAN: What's required at the motion to open? Just the motion and that's it? The court must grant it?

MR. ONETO: That's correct, Your Honor.

The Appellate Court handed down a decision December 10, 2002, upholding the trial court's denial of the Motion To Open. The opinion was completely void of any reference to the Federal claim. The Appellate Court held that the appropriate standard for reviewing the trial court's denial of the motion to open was the "abuse of discretion" standard under state law.

This decision was a surprise to Petitioner, because the court did not follow the lead of the Connecticut Supreme Court in *In re Baby Girl B.*, which is what counsel asked the court to do. In *In re Baby Girl B.*, 224 Conn. 263, 286 (1992), the Connecticut Supreme Court held that it was appropriate for a trial court to open a default judgment terminating a mother's parental rights, where the mother's failure to appear was excusable, and a denial of the motion would prevent the mother from presenting a defense on the merits, as is required by the Fourteenth Amendment.

Moreover, the Appellate Court did not take into account its own rulings regarding the appropriate standard of review in parental rights terminations cases. *See In re Shaquanna M.*, 61 Conn. App. 592, 600 (2001) (the trial court had no discretion in denying a parent's motion for continuance in the context of a parental rights termination, because "[t]he abuse of discretion standard 'does not apply to . . . constitutional claims, which are reviewed de novo by the courts.'").

The Appellate Court made no effort to apply the Due Process balancing test set forth in *Santosky*, 455 U.S. at 752-55. Furthermore, the Appellate Court placed the burden of instigating a factual hearing in support of the Motion To Open on the Petitioner, rather than on the trial court. *See In re Salvatore P.*, 74 Conn. App. at 27 ("In seeking to open the termination judgments, the [mother] had the burden . . . to do more than assert an unadorned claim that due to duress, she was unable to attend the termination trial.").[6]

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[6] The decision of the Appellate Court on this point was surprising because the Motion To Open was, by its very nature, a request for an evidentiary hearing. It is true that the Petitioner had not anticipated putting on evidence the day of oral argument, October 15, 2001. But that was because everyone seemed to understand that the October 15 hearing was an argument as to the legal merits of Petitioner's motion. Petitioner would have needed time to assemble her evidence before putting on proof of duress.

As of October 2002, Connecticut law was silent as to the appropriate time to present evidence pursuant to a motion to open. The General Statutes simply required a moving party to supply an affidavit supporting factual allegations raised in such a motion, which the Petitioner supplied. *See* Conn. Gen. Stat. § 52-212.

Moreover, the 2002 Practice Book stated that "a motion to open shall be scheduled for hearing only upon order of the judicial authority." Conn. P.B. § 24-31 (b). Thus, it was not within the Petitioner's power to put on evidence in support of her motion, absent an order of the trial court.

It is interesting to note that since the *Salvatore P.* case, Connecticut has amended its 2003 Practice Book to read: "A hearing on said motion [to open] *shall* be given as a priority matter but no later than 15 days after the same motion has been filed with the clerk of the juvenile court. . . ." Conn. P.B. § 35a-18 (emphasis added).

D. The Connecticut Supreme Court's Treatment of the Federal Claim

Accordingly, the Petitioner filed a Petition For Certification with the Connecticut Supreme Court December 13, 2002.[7] The Connecticut Supreme Court declined the Petition For Certification January 9, 2003. (App., *infra*, 10a).

The Petitioner has since filed this Petition For Certiorari with the United States Supreme Court. It is Petitioner's hope that the Federal Judiciary will give cognizance to her Fourteenth Amendment claim, and clarify for all future cases the kinds of procedural safeguards that the States must use before they can terminate an individual's parental rights.

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[7] The Federal questions presented for review to the Connecticut Supreme Court were as follows:

> **(1)** . . . Connecticut General Statutes § 52-212 is unconstitutional under the Fourteenth Amendment to the extent it bars the courts . . . from opening a default judgment beyond the four-month limitation period, as a matter of law, in cases where a defaulted party could not appear at trial due to . . . duress. . . .
>
> **(2)** Where the State terminated the parental rights of the Petitioner in her absence, the State's interest in protecting the Petitioner's child[ren] and its interest in the finality of judgments under § 52-212 is outweighed by the Petitioner's Due Process rights under the Fourteenth Amendment. . . .
>
> **(9)** The Fourteenth Amendment of the United States Constitution requires a trial court to open a default judgment . . . *as a matter of law* in cases where a party's absence from trial is [inconsistent] . . . with the requirements of the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. This Case Presents Important Questions Of Federal Law That Were Ignored By The Trial & Appellate Courts.

State courts are bound to address Federal claims properly presented. *See Evitts v. Lucey*, 469 U.S. 387, 392 & 401 (1985). This is especially true when the State has terminated a compelling liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 401 ("When a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with Due Process of Law.").

It is unacceptable in our Federal system for State courts to lightly brush aside a person's claim to rights conferred by the national constitution, let alone refuse to cognize such claims. *Id.* "The Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Id.* at 395.

At a minimum, Procedural Due Process under the Fourteenth Amendment is a guarantee that the States will use procedures that minimize the risk of an erroneous deprivation, appropriate to the nature of the right being taken away. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937) ("[The Fourteenth Amendment] asks no more than this, that the [States afford] . . . a trial free from the corrosion of substantial legal error"). *See also Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *Mathews*, 424 U.S. at 333-35; *Lassiter, supra; Santosky, supra.*

It is well settled that parental rights are among the most compelling interests protected by the Fourteenth Amendment. *Lassiter, supra; Santosky, supra.*

The State must meet high procedural hurdles before terminating such rights. *Id.*

When States have a procedural scheme that, on its face, purports to satisfy the mandates of Due Process, such a procedural scheme is meaningless if the trial courts are going to use their discretion to preclude the application of such procedural rights in a particular cases: "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" *Santosky*, 455 U.S. at 755 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

Furthermore, States are not free to place greater weight on certain factors of the *Santosky-Mathews* test, while ignoring other factors. Petitioner's case presents this exact problem. Contrary to what the trial court held, the dispositive consideration on a motion to open a judgment terminating parental rights is not the best interest of the child. *Lassiter, supra; Santosky, supra.*

The interest of the child is just one of several factors to be evaluated. It is impermissible under the Fourteenth Amendment for the States to give their own interest in protecting children supreme weight, if the procedures used to terminate the rights of parents create an impermissibly high risk of an erroneous deprivation. "[T]hough the State's . . . interest is legitimate, it is hardly significant enough to overcome private interests as important as those here [in a trial to terminate parental rights]." *Lassiter*, 452 U.S. at 28.

Rather, the United States Supreme Court has indicated that when the deprivation of such a liberty interest is at stake, the private interest naturally has a compelling amount of weight: "[F]or the natural

parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections." *Santosky*, 455 U.S. at 761.

Part of reducing the risk of erroneous deprivations is strict formality in child welfare proceedings. *See* Amy Sinden, *Why Won't Mom Cooperate?: A Critique Of Informality In Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339 (1999). This requires that a parent have the right to a meaningful opportunity to be heard. The right to be heard is essential to our constitutional jurisprudence. *Goldberg, supra; Boddie, supra; Lassiter, supra.*

In *Goldberg*, the United States Supreme Court emphasized that the Due Process procedures required in a given situation are dictated by the extent to which a grievous loss may be suffered. 397 U.S. at 262-63. *See also Santosky*, 455 U.S. at 758. There are not many losses greater than forever terminating the rights of a parent to be involved in the lives of his or her children: "Few forms of state action are both so severe and so irreversible." *Santosky*, 455 U.S. at 759. In turn, it is necessary that a considerable amount of process is due a parent facing such a loss.

Connecticut failed to provide any procedure, other than the discretion of the trial court in opening Petitioner's motion to open. This procedure is inadequate to protect parental rights in situations where the parent has a good excuse for failing to appear at a trial to terminate parental rights:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses

> the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

In addition, Connecticut places too much emphasis on the best interests of the child, not properly factoring in the parent's interest. "The child is the overriding theme throughout the statute, as in similar statutes of other states." Michael J. Keenan, *Connecticut's Trend in the Termination of Parental Rights and What Can Be Done to Further It*, 10 CONN. PROB. L.J. 269, 277 (1996) (noting several states, including Idaho and Iowa, explicitly require a focus on both the child's and parent's interests).

This case presents such a clear Constitutional violation that it warrants review and further clarification of the process due in terminations of parental rights. Connecticut did not provide Petitioner with a meaningful opportunity to be heard. The Connecticut Appellate Court forever foreclosed Petitioner's right of parenthood for her failure to appear, without providing her an evidentiary hearing to evaluate whether she was, in fact, forced to leave the state out of fear for her safety.

II. The Appellate Court's Decision Is Inconsistent With The Approach Taken By Other States Regarding Application Of The 14th Amendment To The Opening Of Default Judgments In Parental Rights Termination Cases.

The decision of the Appellate Court is inconsistent with the way in which other states have

applied the Fourteenth Amendment to the opening of default judgments in parental rights termination cases. The highest courts of many states have recognized the need for greater procedural safeguards when parental rights have been terminated under questionable circumstances. *See e.g. In re Termination of Parental Rights to Jayton S.*, 629 N.W.2d 768, 775 (Wis. 2001).

Washington applies the *Mathews* balancing test to the opening of a default judgment terminating parental rights, where the parent returns with a good excuse for her absence and asserts a defense on the merits. *Department of Social & Health Services v. Brown*, 62 Wash. App. at 615-16 ("a parent's failure to respond to notices and summons of a proceeding to terminate parental rights, in itself, does not preclude the State from obtaining a judgment.... However, we conclude that a hearing on the merits of the case is necessary to satisfy due process requirements.").

Oregon requires that the State give a parent facing termination of parental rights an opportunity to present evidence showing that the default termination was in error. *Juvenile Dept. v. Kopp*, 180 Or. App. at 578 ("[W]here a terminated parent has asserted a defect in the proceeding leading to termination, a hearing under the latter statute -- in which, for example, a parent can develop a factual record relating to the asserted defect -- is best suited for providing the parent with the required opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotes omitted)).

New Mexico puts the burden on the state to show that a parent's failure to appear at a termination proceeding amounted to a waiver of her right to present a defense on the merits. *State Children Youth & Fam. Dept. v. Stella P.*, 127 N.M. at 705 ("Minimum consideration of due process requires the children's

court to inquire explicitly and on the record as to whether Mother validly intended to waive her right to contest the termination.")

Nevada also recognizes the need for liberal default judgment rules in the parental rights termination context. "If there is a refusal to set aside a default, a ruinous judgment may be sustained against a party who, upon hearing, might have interposed a perfectly good defense. By sustaining the default, he would forever be debarred the right of a hearing..." *Price v. Dunn*, 787 P. 2d 785, 788 (Nev. 1990).

The U.S. Supreme Court has emphasized the need for heightened procedural safeguards in the default judgment context when fundamental liberty interests are involved. *See Klapprott*, 335 U.S. at 614-15. While many States have responded by creating such safeguards, other states, including Connecticut, have failed to consistently afford Due Process to citizens facing termination of their parental rights. States such as Connecticut need to be reminded that Due Process, as guaranteed by the Fourteenth Amendment, must be addressed when raised by individuals, and cannot summarily be swept under the rug.

III. The Decision Of The Appellate Court Reflects A Trend Whereby Connecticut Gives Nominal Recognition to Parent's Due Process Rights But In Practice Tends To Focus On Its Own Policy Interests.

Despite case law on point regarding the Federal Due Process procedures necessary to terminate parental rights, the Connecticut Appellate Court exploited the absence of clear rules governing the opening of default judgments under State law to, in effect, make up rules that enabled the court to avoid having to decide

Petitioner's Fourteenth Amendment claim. Most egregiously, the Appellate court held that the Petitioner failed to offer evidence of duress, when it was clear that the Motion To Open was, on its face and by its nature, a request for an evidentiary hearing.

Just two years ago, the Connecticut Appellate Court recognized that the appropriate standard of review of a trial court's denial of a motion involving Fourteenth Amendment challenges in a parental rights termination case was the *Mathews-Santosky* test. *In re Shaquanna M.*, 61 Conn. App. 592 (2001). "The abuse of discretion standard 'does not apply to constitutional ... claims, which are reviewed *de novo* by the courts.'" *Id.* at 600 (emphasis added) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493 (1991)).

Despite the Appellate Court's clear directive in *In re Shaquanna M.*, it failed to acknowledge this analysis less than two years later when it reviewed Petitioner's claim as abuse of discretion, rather than de novo. In fact, it failed to consider her Due Process claims altogether.

This isn't the first time the court inappropriately placed the burden on parents to demand Due Process. In another decision by the Connecticut Appellate Court, the burden was placed directly on the parents to demand an evidentiary hearing in challenging the default termination of their parental rights, despite the fact that the trial court explicitly stated that witness testimony was not necessary. *McLaughlin v. Smoron*, 62 Conn. App. 367, 376 n. 8 (2001) (citing how it was Smoron's responsibility to object or request to call witness after the trial court stated "[o]kay, I don't feel it necessary at this point to have witness testimony.")

Requiring the moving party to demand an evidentiary hearing after invoking Constitutional rights

to Due Process is not only contrary to notions of fairness, but also violates procedural Due Process because Connecticut's statutes for opening default judgments do not indicate that such a demand is necessary or even possible. Rather, the only input given by the statute is the need for an affidavit, which Petitioner completed. *See* Conn. Gen. Stat. § 52-212.

Moreover, the 2002 Practice Book expressly stated: "a motion to open shall be scheduled for hearing only upon order of the judicial authority." Conn. P.B. § 24-31 (b). Thus, it was not within the Petitioner's power to put on evidence in support of her motion, absent an order of the trial court. Ironically, Connecticut has since amended its Practice Book to require a factual hearing pursuant to a motion to open in juvenile cases "no later than 15 days after the [motion] has been filed with the clerk of the juvenile court." Conn. P.B. § 35a-18 (2003).

This may seem like a generous grant of procedural rights to parents. However, when practically applied, this rule, in effect, creates a very short window that forecloses the ability of parents to defend against default judgments terminating parental rights regardless of the circumstances surrounding the failure to appear.

This change in the Practice Book after the *Salvatore P.* case is similar to what the Legislature did after the *Baby B.* case: It amended the statute governing the opening of default judgments to eliminate the courts' continuing jurisdiction to open judgments specifically relating to the termination of parental rights. *See* Conn. Gen. Stat. § 52-212a; *In re Baby Girl B., supra.*

In *In re Baby Girl B.*, 224 Conn. 263 (1992), the Connecticut Supreme Court held that the trial court properly opened a judgment terminating parental rights, under circumstances in which the mother's

failure to appear was excusable and a new hearing would give the mother a meaningful opportunity to be heard: "Courts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment obtained by fraud, *duress*, or mutual mistake. " *Id.* at 283.

In Petitioner's case, the court failed to use its "intrinsic powers," a failure that amounted to a violation of Petitioner's Constitutional rights. During the argument on the motion to open, the trial court would not hear Petitioner's argument regarding duress and failed to order an evidentiary hearing to evaluate the factual basis of the claim. It simply assumed facts not in evidence: "We didn't know where your client was *based on decisions and actions that she made.*"

In Petitioner's case, the Connecticut Appellate Court has demonstrated an inability to properly apply the Fourteenth Amendment to proceedings touching the most fundamental rights of the Petitioner. Leaving such fundamental rights to the discretion of a trial court, without requiring a hearing, or any other process calculated to reach the merits of Petitioner's case, is unconstitutional

IV. The decision Of The Appellate Court Forever Foreclosed Petitioner's Ability To Present Evidence That She Did Not Abandon Her Children, But Was Absent Against Her Will In Another State, Resulting In Irreparable Harm To The Petitioner And Her Family.

Petitioner's bond with her children continues to erode with every day that passes. It is contrary to fundamental concepts of liberty that the State can terminate Petitioner's parenthood without affording her an opportunity to be heard, then sit back and let its own

interest in keeping custody of Petitioner's children grow under the *Mathews* test, by the sheer fact that Petitioner's children are building new family relationships in foster care. The entire termination was Constitutionally deficient, and Connecticut should not be able to enjoy the fruits of its impermissible conduct.

The Connecticut courts had no compelling reason why they could not afford the Petitioner an opportunity to present evidence that duress prevented her from attending a trial terminating her parenthood. The claim of duress, if proven at a factual hearing, would completely negate the trial court's finding that the Petitioner abandoned her children and failed to maintain a relationship with her children.

The Petitioner has a compelling liberty interest in her parental rights that warranted procedures for opening the default judgment beyond the arbitrary discretion of the trial court. The Appellate Court should have given cognizance to her Federal claim. It should have applied the *Mathews-Santosky* balancing test in deciding whether the Petitioner was entitled to an evidentiary hearing on the duress issue.

It was improper for the Appellate Court to take advantage of technical uncertainties in state law and place the risk of loss on the Petitioner because she did not offer testimony upon filing her motion to open. Petitioner submitted an affidavit as the governing statute required. *See* Conn. Gen. Stat. § 52-212.

The motion to open was, by its nature, a request for such a hearing. It was arbitrary for the court to hold that the Petitioner had to have her evidence of duress mobilized the day the trial court denied the motion. The revised Connecticut Practice Book for 2003, § 35a-18, gives movants 15 days to present evidence necessary to substantiate a motion to open in child welfare cases.

Had this procedure been available to the petitioner, she would have been able to present a meritorious defense.

Due Process demands that the Petitioner have an opportunity to contest the findings of the trial court terminating her parenthood. If the Petitioner can show duress, it would establish that her failure to appear was not a deliberate waiver of her right to be heard. It would also negate the trial court's finding, by clear and convincing evidence, that she abandoned her children and failed to maintain a relationship with them.

CONCLUSION

The Petition For Certiorari should be granted, respectfully submitted April 9, 2003.

MARGARET SMITH,
PETITIONER

ALBERT J. ONETO III
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P.O. BOX 185327
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NO. _____

In The

Supreme Court Of The United States

IN RE SALVATORE P.

MARGARET SMITH,

Petitioner,

v.

STATE OF CONNECTICUT; CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES; CHRISTINE RAGAGLIA, Commissioner Of The Connecticut Department of Children And Families,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

APPENDICES

APPENDICES

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IN RE SALVATORE P. ET AL.*
(AC 22700)

APPELLATE COURT OF CONNECTICUT

74 Conn. App. 23; 812 A.2d 70

September 9, 2002, Argued
December 10, 2002, Officially Released

Lavery, C. J., and Dranginis and Freedman, Js.

FREEDMAN, J. The respondent mother appeals from the denial of her motion to open and to vacate the judgments of the trial court terminating her parental rights with respect to her two minor children.[1] We affirm the judgments of the trial court.

The following facts are necessary for the resolution of the respondent's appeal. On October 13, 2000, the petitioner, the commissioner of the department of children and families (commissioner), filed petitions to terminate the respondent's parental rights as to the children. The respondent was served with the petitions via publication in the New Haven Register. On November 6, 2000, the respondent was defaulted for failure to appear in court.

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* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-3, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to person having a proper interest therein and upon order of the Appellate Court.
Reporter of Judicial Decisions

[1] The court also terminated the parental rights of the respondent fathers of each of the children. Because neither father has appealed, we refer in this opinion to the respondent mother as the respondent.

The trial on the termination petitions commenced on January 25, 2001, and lasted for four days. Although the respondent was not present at trial, she was represented by counsel throughout the court proceedings. On April 9, 2001, the court, in a thorough and comprehensive memorandum of decision, terminated the respondent's parental rights as to both children. The respondent did not appeal from that decision.

On August 24, 2001, the respondent filed a motion to open and to vacate the judgments. In the motion, the respondent asserted that she never had received notice, by service or otherwise, that termination petitions had been filed by the commissioner. She also asserted that she had defenses at the time of the rendition of the judgments, "but was unable to appear to assert such defenses due to her absence ...." The respondent attached her affidavit to the motion in which she averred in relevant part that "my defenses regarding the termination proceeding included that I was residing with people who prevented my access to the mails or telephones, that I had been in fear of my safety, that I am the psychological parent and an important parental figure of the minor children ...."

Oral argument on the respondent's motion took place on October 24, 2001. The respondent was present at the hearing on the motion to open and to vacate the judgments but did not testify. At the conclusion of the argument, the court denied the motion. The respondent then filed the present appeal.

I

The respondent first claims that the court improperly denied her motion to open the judgments as a matter of law. In support of that argument, the

respondent specifically argues that she was unable to attend the termination trial due to circumstances constituting duress. The commissioner counters that the respondent failed to file her motion within four months of the termination judgments as required by General Statutes § 52-212a and that the court, therefore, properly denied the motion.[2]

General Statutes § 52-212a[3] provides in relevant part that "unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. ..." In the present case, it is undisputed that the judgments terminating the respondent's parental rights were rendered on April 9, 2001. The respondent's motion to open and to vacate the judgments was filed on August 24, 2001, more than four months after the termination judgments were rendered. The court, therefore, did not have the authority to grant the relief requested by the respondent.[4]

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[2] The commissioner points out that the respondent's reliance on General Statutes § 52-212 to support the opening of the termination judgments is inaccurate, as § 52-212 refers to the opening of a default judgment. The commissioner further contends that although the respondent was defaulted, the termination judgments were rendered after a contested four day trial in which the respondent was represented by counsel. The commissioner argues, therefore, that the applicable statute is General Statutes § 52-212a. We note, however, that both §§ 52-212 and 52-212a contain the requirement that a motion to open be filed within four months of the date on which judgment is rendered or passed.

[3] See footnote 2.

[4] The commissioner contends that because she did not waive or consent to the waiver of the four month time limit, the court was

We note, however, that "courts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate any judgment obtained by fraud, duress or mutual mistake." *In re Baby Girl B.*, 224 Conn. 263, 283, 618 A.2d 1 (1992). "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Carlin Contracting Co.* v. *Dept. of Consumer Protection*, 49 Conn. App. 501, 503, 714 A.2d 714 (1998). The issue before us is whether the court abused its discretion in refusing to open the judgments on the ground of duress. Under the circumstances of this case, we conclude that the court did not abuse its discretion in denying the motion.

In seeking to open the termination judgments, the respondent had the burden at the hearing to do more than assert an unadorned claim that due to duress, she was unable to attend the termination trial. See *Housing Authority v. Lamothe*, 225 Conn. 757, 769, 627 A.2d 367 (1993). The motion to open, grounded on duress, necessarily required the court to make a factual determination with regard to the alleged duress. Id.; see also *Jenks v. Jenks*, 232 Conn. 750, 753, 657 A.2d 1107

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without jurisdiction to grant the requested relief. In *Kim v. Magnotta*, 249 Conn. 94, 102-103, 733 A.2d 809 (1999), our Supreme Court held, however, that General Statutes § 52-212a acts "as a limitation on the trial court's general authority to grant relief from a judgment, not as a limitation on its personal jurisdiction over the parties."

(1995).[5] The court in the present case, however, was presented with no evidence at the hearing on which to make that factual determination.

The record reflects that although the respondent was present at the hearing on the motion to open and to vacate the termination judgments, she did not testify, and no evidence was introduced on her behalf as to why the motion to open should be granted. Although the respondent's affidavit, attached to the motion, indicated that she had been "residing with people who prevented [her] access to the mails or telephones," and that she "had been in fear of [her] safety," no evidence was offered in support of those conclusory statements.[6] Although the respondent argues in her brief that "[her] disappearance was the result of duress, not intention," the court was presented with no evidence on which to make such a finding.[7] The court, therefore, did not

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[5] We recognize that *Lamothe* and *Jenks* involved stipulated judgments in which the motion to open was filed within four months.

[6] The commissioner correctly pointed out during oral argument on the motion to open that "the supporting affidavit that was prepared by the mother, does not in any way, shape or form explain why she wasn't able to even make a phone call to anybody, not to her mother, not to [the department of children and families], not to a cousin. ...

"The mother fails in her affidavit to indicate what her defenses might be to a termination of parental rights. She also fails to identify how she was prevented from returning to the state of Connecticut. She doesn't indicate why she was able to come back to the state of Connecticut in April of 2000. And I believe that was when the social worker testified that she offered the mother assistance. And then the mother disappeared again."

[7] The court questioned counsel for the respondent as to whether the respondent had sought assistance during the alleged time of duress, and the response was that she had not. The following

abuse its discretion in denying the respondent's motion to open and to vacate the judgments on the ground of duress.[8]

II

The respondent next claims that the court improperly found that service of process by publication was sufficient in this case. We disagree.

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colloquy, in relevant part, occurred between the court and the respondent's counsel:

"The Court: Did your client ever ask law enforcement for help? Did she ever ask for the witness protection program? Did she ever [ask] to be taken into protective custody? Did she ever ask the state of Connecticut for--for help in keeping her safe?

"[Respondent's Counsel]: I don't believe that she did, Your Honor."

[8] The respondent raises two additional arguments in support of her claim that the court improperly denied her motion to open. She first argues that the court, at trial, improperly struck the cross-examination testimony of a department of children and families worker who possessed knowledge that the respondent was being held against her will. As to that claim, we note that the issue presently before this court is whether the trial court properly denied the respondent's motion to open in the absence of any evidence to support her claim of duress. Evidentiary rulings made during the course of the underlying termination proceedings, on which no appeal was taken, are not properly before this court.

The respondent also argues that the court improperly relied on the best interest of the child standard in denying the motion to open. With regard to that claim, we simply refer to General Statutes § 45a-719, which provides in relevant part: "The court may grant a motion to open or set aside a judgment terminating parental rights pursuant to section 52-212 or 52-212a or pursuant to common law or may grant a petition for a new trial on the issue of the termination of parental rights, *provided the court shall consider the best interest of the child*, except that no such motion or petition may be granted if a final decree of adoption has been issued prior to the filing of any such motion or petition. ..." (Emphasis added.)

The respondent was served with the petitions for termination of parental rights via publication in the New Haven Register. Such service is permissible at least ten days before the date of the hearing in situations in which the respondent's whereabouts are unknown. General Statutes § 45a-716 (c).[9]

The court's thorough memorandum of decision reflects the following facts that pertain to the respondent's claim. The commissioner assumed care of the children in May, 1999. The intention at that time was to work with the respondent toward reunifying her with the children. The commissioner provided services to the respondent in furtherance of that goal. In October, 1999, the respondent's whereabouts became unknown. She reappeared in April, 2000, and told Francine Leonard, the department caseworker assigned to this case, that she had resumed drug use, was living in a motel in Stratford and was working as a dancer in a topless bar. The respondent told Leonard that she wanted to get back into treatment and get her children back. The commissioner thereafter secured a shelter bed for the respondent, but she never appeared at the shelter.

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[9] General Statutes § 45a-716 (c) provides in relevant part: "If the address of any person entitled to personal service or service at the person's usual place of abode is unknown, or if personal service or service at the person's usual place of abode cannot be reasonably effected within the state or if any person enumerated in subsection (b) of this section is out of the state, a judge or clerk of the court shall order notice to be given by registered or certified mail, return receipt requested, or by publication at least ten days before the date of the hearing. Any publication shall be in a newspaper of general circulation in the place of the last-known address of the person to be notified, whether within or without this state, or if no such address is known, in the place where the termination petition has been filed."

Leonard told the respondent in April, 2000, that if the respondent did not "get her act together," the commissioner probably would file petitions for the termination of her parental rights. Leonard had no further contact with the respondent.

At the commencement of trial, counsel for the respondent admitted that he had sent letters to the respondent, but that he had not seen her since October, 1999. According to the respondent's affidavit, attached to the motion to open, she left Connecticut in April, 2000, and did not return until July, 2001.

We recognize that "notice by publication, although sometimes necessary, is not the preferred method for assuring full participation in so significant an impairment of constitutionally protected parental rights." *In re Baby Girl B., supra,* 224 Conn. at 295. In the present case, however, the respondent chose to absent herself and to make her whereabouts unknown after having been informed that petitions to terminate her parental rights could be filed. Her interests were, however, represented by counsel during the proceedings on the termination petitions.

At a conference prior to the commencement of trial, counsel for the respondent inquired whether an attorney or guardian ad litem should be appointed to do a diligent search for the respondent. In response, the court expressed its views about how the respondent had been given chances to engage in services and then had disappeared.[10] We agree with the court and conclude

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[10] The court stated in part that "this isn't a situation where she wasn't aware of what's going on. You know, it's not a situation where there's a real question of whether she ever knew that she was the mother of these children, which is often the case when it's the father. They tried to engage her in services, she didn't want to know

that in this case, in which the respondent's whereabouts were unknown, service properly was effected via publication.

III

The respondent next claims that the court improperly acted on the motion to open. The respondent argues that the court, having presided over the trial at which the respondent was not present, was unable objectively to decide the motion to open, and, therefore, it should have been referred to another judge. We disagree.

The respondent did not file a motion for disqualification of the trial judge prior to or during the argument on the motion to open. "It is a well settled general rule that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court via a motion for disqualification or a motion for mistrial." *Gillis v. Gillis*, 214 Conn. 336, 343, 572 A.2d 323 (1990). Because the respondent did not file a motion for disqualification, she cannot prevail on her claim that the motion to open should have been heard by another judge.

The judgments are affirmed.

In this opinion the other judges concurred.

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about it. ... She has chosen not to be involved in these children's lives, and she has, you know, chosen not to take advantage of services that were offered. It's not something where I feel as though we omitted anything. She doesn't want to be found, my guess is."

IN RE SALVATORE P. ET AL.

SUPREME COURT OF CONNECTICUT

262 Conn. 934; 815 A.2d 135

Decided January 9, 2003

Albert J. Oneto III, Hamden, in support of the petition.

Maureen D. Regula, assistant attorney general, in opposition.

The respondent mother's petition for certification for appeal from the Appellate Court, 74 Conn. App. 23, 812 A.2d 70 (2002), is denied.

ZARELLA, J., did not participate in the consideration or decision of this petition.

NO5-CP-99-010763-A : SUPERIOR COURT

SALVATORE, P. JR. : JUDICIAL DISTRICT

NO5-CP-99-010764-A : JUVENILE MATTERS

T. S. : AT NEW HAVEN

OCTOBER 24th, 2001 : FORNEW HAVEN COUNTY

BEFORE:

THE HONORABLE BERNADETTE CONWAY, JUDGE

APPEARANCES:

SONIA STOLOFF, ESQ.

ASSISTANT ATTORNEY GENERAL for DCF

KASEY DALTON

SOCIAL WORKER for DCF

CAROL ANN BROWN, ESQ.

COUNSEL for the CHILDREN

ALBERT ONETO, ESQ.

COUNSEL for the MOTHER

ALSO PRESENT:

MARGARET SMITH

MOTHER of the CHILDREN

LETITIA SOYBEL

COURT MONITOR

MS. STOLOFF: Good afternoon, your Honor.

This is the matter of Salvatore P. and T. S. I'm Attorney Stoloff, representing the Department, and with me from DCF is Kasey Dalton, who is the new social worker on the case.

MS. BROWN: Carol Ann Brown for the minor child.

MS. SMITH: Margaret Smith.

MR. ONETO: Attorney Albert Oneto, representing Margaret Smith, your Honor, and it's my motion to open judgment in the case.

THE COURT: Are you pre-120 days or post-120 days?

MR. ONETO: I am post-120 days, your Honor. However, I did file a memorandum of law that supports my motion and the affidavit that was prepared by my client - or for my client, signed by her.

THE COURT: Well, do you want to be heard further beyond what you've written in your motion?

MR. ONETO: I - yes, your Honor.

THE COURT: Okay. Go ahead.

MR. ONETO: My - the basis of my filing of the motion to open and vacate the judgment is pursuant to 52-212. 52-212, of course, as you indicate, your Honor, has a four-month period. There are three prongs to the 52-212 requirement. One is a default judgment has to enter. The second, that a motion to open has to be filed within four months. And a third that is has to show reasonable cause or that a defense, in whole or part, existed at the time of the trial, and the defendant was prevented, by mistake, absence, or other reasonable cause from - for prosecuting her defense.

There was a default judgment that was entered on 11-6. And, in fact, the trial was commenced on January 25th, with a decision that your Honor wrote that was published April 9th, '01. I did ask for a continuance on January 25th to have a guardian ad litem appointed to find my client, which was, in fact denied. And there was the default judgment then proceeded.

Ms. Smith came back to Connecticut in July and when she came back she found out that her rights were terminated. However, she did contact me after that four-month period. However, the four-month period, as a matter of interpretation by the Connecticut Supreme Court, does not necessarily bar her from coming in and asking your Honor to open the judgment. In fact, there are two cases that I found. One is the precursor to 50-212, which is called Dante versus Dante. And the second one was In Re: Baby B. Both - in both cases the motion to open judgment was filed within the 4th and 5th month. And in both cases the motion was allowed to open.

In my client's case, she had signed an affidavit that's attached to my motion, that clearly indicates that she had feared for her safety while she was here. She left the jurisdiction before the service of - of the TPR petitions, which was done by publication. When she returned is when she found out.

It's not a case where she actually received the notice and left the state and came back. She, in fact, did not have constructive notice. She was out of the state when the TPR petitions were, in fact, filed.

So the case of In Re: Baby B. I think clearly sets out the parameters for the exercisement of judicial authority, that is above or beyond the -

THE COURT: Attorney - we don't need to deal with - I - I understand it's purely within the Court's discretion.

What you have to convince me is why I should exercise my discretion, based on the amount of time and the amount of effort that this Court put into moving to a final judgment on this case.

Why would the Court, based on the totality of the circumstances, as this Court is extremely familiar with, as this Court wrote a very in-depth decision, after a very in-depth trial, why this Court would possibly exercise it's discretionary power and reopen this judgment.

MR. ONETO: Well, your Honor, if I agree that the - that the case was only a discretionary issue, then I would have to convince you of that. However, the first prong or the first part of the third prong, the reasonable prong statute, basically says that, as a matter of law, where publication has not been constructive, that mother subject to the circumstances of - of her not being present, that the Court could open the judgment as a matter of law.

THE COURT: Could - again, could. It's all could - doesn't have to, not mandated. There was clearly proper service. It was confirmed. I dealt with that in my opinion. We're dealing with the Court's discretion. And you need to move forward as to what compelling reasons I should even entertain a discretionary re-opening of this judgment.

MR. ONETO: Well, your Honor, my client was clearly bonded with her children. She did not have the opportunity to show that. I did not have her assistance with me in order cross-examine witnesses or even present witnesses.

THE COURT: Through whose fault is that, Attorney Oneto?

MR. ONETO: Well, that goes to the issue of duress, your Honor. She had to leave the state. She – she could not be here because she feared for her life. Once that – that threat was over, she, in fact, did come back.

Your Honor, I – I was cross-examining the DCF worker Leonard. She was – and I was eliciting from her the fact that she was aware that – that mother had – was under duress. She was kept in an apartment by –

THE COURT: Attorney Oneto, we'd have to go back to the transcript. But, as I recall, I believe I struck a good portion of that testimony.

MR. ONETO: Exactly, your Honor. That –

THE COURT: So that's not evidence in front of the Court at this point.

Did your client ever ask the law enforcement for help? Did she ever ask for witness protection program? Did she ever to be taken into protective custody? Did she ever ask the State of Connecticut for – for help in keeping her safe?

MR. ONETO: I don't believe that she did, your Honor.

THE COURT: There was very explicit testimony from family members, from her own family members, as to that her behavior had been, up until the time of the trial, and her inconsistency in keeping the trial, and her inconsistency in keeping the trial – as I recall, DCF had offered her a shelter bed, found her a shelter bed. She never showed up at the shelter bed. Her own family members as I recall, her mother and another female –

MS. STOLOFF: It was a cousin.

THE COURT: -- cousin testified that they had had contact with her and then they didn't have contact with her.

MR. ONETO: Your Honor, up until the time that she left the state, the Department, in fact, was going to give her back her kids.

THE COURT: And that is in my opinion. Reunification was the plan. And, initially, when the children were first committed into care, reunification was occurring and things were progressing. Your client made - and I indicated in my opinion, your client made choices and made decisions that were inconsistent with that plan.

MR. ONETO: Your Honor, the father I believe is withdrawing his appeal. I believe that the two children, there is no permanent home for them right now.

THE COURT: That's not really a part of the argument for the motion today. Those are not relevant, as to your motion to reopen the judgment -

MR. ONETO: Well, your Honor, her -

THE COURT: -- as to your client.

MR. ONETO: -- her - her absence and inability to assist me in the defense of her case really goes to all three of the grounds that your Honor found her lacking in, the grounds of abandonment, to include the grounds to failure to rehab. And I believe your decision, which I - I handed out copies, clearly point out -

THE COURT: I only got the first two pages of my opinion though. It was a little bit longer than that, as I recall. I have it in the file. I'm aware of the opinion.

Anything else, Attorney Oneto?

MR. ONETO: That's it, your Honor.

THE COURT: What do you want to say, Attorney Stoloff?

MS. STOLOFF: Your Honor, a couple of things. One is, this was not a default judgment. This was a judgment

rendered after a very full evidentiary trial, with a lot of testimony and a lot of evidence to support the grounds that were found, ultimately, of abandonment, failure to rehabilitate, and no ongoing parent-child relationship.

The - the statute is very clear that the - the motion to open and vacate the judgment needs to be filed within four months. It was filed beyond the four-month period of time. And the, in terms of - of the affidavit, the supporting affidavit, that was prepared by the mother, does not in any way, shape, or form explain why she wasn't able to even make a phone call to anybody, not to her mother, not to DCF, not to a cousin. She did reappear after she disappeared in 1999. She reappeared in April of -

THE COURT: But what affidavit are you referring to?

MS. STOLOFF: There's an affidavit that is attached to -

MR. ONETO: Attached to my motion, your Honor.

MS. STOLOFF: -- to the motion to open judgment and vacate.

THE COURT: I guess I didn't get -

MR. ONETO: It should be on the original. I filed a memorandum of law. But in th efile there should be a copy of my motion and the affidavit.

THE COURT: I have the memorandum and then I have pages of transcript.

MS. STOLOFF: No, no. There's a - there's the original motion, your Honor, that was filed by Attorney Oneto. And he has -

THE COURT: Oh, it's not with the memorandum?

MR. ONETO: No, your Honor.

MS. STOLOFF: And he has - and he has an affidavit in there.

I would say certainly the statute recognizes that publication is a valid form of notice. And we did have notice in this case by publication to the mother. The mother fails in her affidavit to indicate what her defenses might be to a termination of parental rights. She also fails to identify how she was prevented from returning to the State of Connecticut. She doesn't indicate why she was able to come back to the State of Connecticut in April of 2000. And I believe that that was when the social worker testified that she offered the mother assistance. And then the mother disappeared again.

The - the Court should not entertain this motion to open and vacate the judgment. These children need to move on with their lives. In response to Attorney Oneto, T. is in fact in a per-adoptive foster home. Sal is in a therapeutic foster home. We are moving forward with permanency planning for both children. And I would ask the Court to not disturb the - the Court's decision of the termination of parental rights. And I would ask the Court to deny the motion to open and to sustain the objection.

THE COURT: Do you have any brief response, Attorney Oneto?

MR. ONETO: Yes, I do, your Honor.

THE COURT: Brief.

MR. ONETO: The - the issues that are raised by the Sate are factual issues that are necessary to be brought out at the trial, which is why I asked for a new trial.

THE COURT: But, Attorney Oneto, everything in life has to begin and end. And your client was given opportunity to present himself and to litigate the issues with her present. She chose not appear.

MR. ONETO: But, your Honor, she -

THE COURT: We litigated the issues.

MR. ONETO: She - she had no notice. She was in New Jersey.

THE COURT: She had notice via publication, which according to the statute, is perfectly acceptable when that is all the Department has, in terms of being able to notify a litigate. The statutes clearly says publication is acceptable.

We didn't know where your client was based on decisions and actions that she made. And I will not reopen a judgment that has been fully and lengthily litigated because once again on the 23rd hour your client has decided to pop back into the picture. Nor would it be in these children's best interest. And it's unfortunate because the Court really strove and hoped that I could keep these two children together.

MS. SMITH: My son Sal, not for nothing, is nine years old. And, yes, I - he hasn't seen me in awhile. But I know if anyone in this courtroom today wants to ask him if he wanted to be reunited and back with his mother, he would say yes. People make mistakes. I am not perfect. I understand I wasn't perfect. But people deserve a second chance.

THE COURT: Ma'am, I'm not trying to do this to punish you. But you did have chances. You had more than one chance. The Department did work with you. They did try. There's no more time left to give you any more chances.

MR. ONETO: Your Honor, may I note my objection for the record?

THE COURT: Yes. Deny the motion.

MS. STOLOFF: Thank you, your Honor.

(Whereupon the hearing was concluded).

NO5-CP99-010763-A IN THE INTEREST OF SALVATORE P.[1]	:	STATE OF CONNECTICUT
	:	SUPERIOR COURT
NO5-CP99-010764-A IN THE INTEREST OF T. S.	:	FOR JUVENILE MATTERS
	:	AT NEW HAVEN

APRIL 9, 2001

MEMORANDUM OF DECISION

On October 13, 2000 the Department of Children and Families (DCF) filed petitions to terminate the parental rights of Margaret Smith and Salvatore P. as to their son Salvatore Jr. and as to Ms. Smith's and Maurice E.'s son T. Respondent mother and respondent father E. were served with the petition via publication. Respondent father P. was personally served. Ms. Smith and Mr. E. were represented by counsel throughout the court proceedings.[2] Both Ms. Smith and Mr. E. were defaulted for nonappearance on November 6, 2000. The court has jurisdiction in this matter and there is no pending action affecting custody of the children in any other court. The statutory grounds alleged for the termination of parental rights petition for the

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[1] Thus entitled in accordance with Connecticut General Statutes § 46b-124, and Practice Book § 35-5.

[2] Ms. Smith did not initially reveal Mr. E's name to DCF. It was only after working with the respondent mother over a period of time did Ms. Smith eventually name Maurice E. as T.'s putative father. The only information given by Ms. Smith was the putative father's name. DCF's motion to amend the May 7, 1999 neglect petition to cite in Mr. E. as a party to the neglect proceedings was granted on March 6, 2000. A diligent search to locate Maurice E. proved unsuccessful. Mr. E. has never made himself known to DCF or to the court.

respondent mother are abandonment, failure to rehabilitate, and no ongoing parent child relationship. The grounds alleged for respondent father E. are abandonment and no ongoing parent child relationship. The grounds alleged for respondent father P. are abandonment, failure to rehabilitate, and no ongoing parent child relationship. The parental rights termination trial commenced on January 25, 2001, and resumed on February 15 and again on March 15, 2001. Evidence and closing arguments concluded on March 16, 2001.

Salvatore Jr. was born on February 1, 1992. T. was born on September 16, 1998. DCF assumed care of the children in May of 1999. The children were removed from the respondent mother's care after she left the two children alone in an apartment late one night and failed to return or to make her whereabouts known. Neither respondent father was a resource for the children. On order of temporary custody was obtained and neglect petitions were filed.

Francine Leonard, a DCF worker, was assigned the case in May of 1999. Respondent mother contacted Ms. Leonard approximately one and a half weeks after the children had been placed in DCF care. DCF's intention was to work with the mother toward reunification. Ms. Smith voluntarily entered and completed a substance abuse program at Yale Psychiatric Institute (Y.P.I.). She was referred for follow up care to Connecticut Mental Health (C.M.H.). Respondent mother had weekly visits with the children, at which she was appropriate with the children. In October of 1999 respondent mother became whereabouts unknown. Respondent mother was defaulted for nonappearance on the neglect petition on

January 19, 2000 and the children were committed to DCF for a period of one year.[3]

Ms. Smith resurfaced in April of 2000. Respondent mother told DCF that she had resumed drug use, was living in a motel in Stratford, Ct. and working as a dancer in a topless bar. Ms. Smith told Ms. Leonard that she wanted to get back into treatment and that she wanted to get her children back. DCF secured a shelter bed for Ms. Smith but Ms. Smith never appeared at the shelter. Ms. Leonard told Ms. Smith at the April 2000 meeting that if the respondent mother did not get her act together DCF would probably file termination of parental rights petitions. Ms. Leonard had no further contact with respondent mother and ceased being a worker on the case in May 2000.

Ms. Loren Landolfi was assigned as the new DCF worker in June of 2000. She never met or had contact with Ms. Smith or Mr. E.

The paternity of Salvatore Jr. was questioned by Mr. P. prior to DCF involvement. A paternity test confirmed that Mr. P. was the father of Salvatore Junior.[4] Child support payments were court ordered and evidence at trial reflects that money was taken from Mr. P.'s paychecks beginning in 1995 through 1999.[5]

In 1991 Mr. P. was arrested on a Larceny in the Second Degree charge. Mr. P. received a three year

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[3] Mr. P. was allowed to stand silent as to the neglect petition.

[4] It was unclear at trial when the paternity test was conducted. Mr. P. believed it was in 1996.

[5] Respondent father P.'s exhibit 1 does not indicate who the payee of the support payments was until March of 1997. From June of 1997 to August of 1997 it was Ms. Smith. From April of 1998 to September of 1999 it was the State of Connecticut. The amount and the occurrence of the payment fluctuated, apparently because Mr. P. worked for a pool installation company with employment needs that varied in accordance with the time of the year.

suspended sentence and was placed on probation. He was subsequently convicted of a violation of probation and received a two year period of incarceration.[6] In October of 1998 Mr. P. was re-incarcerated on an I.N.S. deportation warrant.[7] I.N.S. deemed Mr. P. to be an aggravated felon and thus sought to have him deported to Italy. He was held without bond from October of 1998 until February 2001.[8]

Mr. P. and Margaret Smith briefly lived together the first year of Salvatore Jr.'s life. It was a mutually destructive relationship. The maternal grandmother, Janice Baskay and a maternal first cousin, Sherry Cyr, both testified that the respondent mother and baby lived primarily with the maternal great grandparents. Ms. Smith's and Mr. P.'s relationship ended a few moths after Salvatore Jr.'s birth. According to Ms. Sherry Cyr, her family arranged to have Mr. P. visit with Salvatore Jr. when Margaret Smith would not be around. Ms. Cyr testified however that the visits between the respondent father and child ended before the child was a year old.

Ms. Cyr testified that Ms. Smith was never a proper parent to Salvatore Jr. The maternal great grandparents (Ms. Cyr's grandparents) basically cared for Salvatore. The year Salvatore Jr. attended kindergarten he moved from the maternal great grandparents house into Ms. Cyr's home. Salvatore Jr.

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[6] The violation of probation conviction occurred on March 13, 1993. The basis for the violation of probation stemmed from a domestic violence incident involving Ms. Smith. Mr. P. was released from prison in 1994.

[7] Mr. P. was born in Italy and came to live in the United States when he was six years old.

[8] Mr. P. had been held on a final order of deportation. A change in immigration law allowed Mr. P. an opportunity to have his case reopened and in the process a $7,000 bond was set and posted by Mr. P.'s parents in February of 2001.

resided with Ms. Cyr for approximately one year. During the child's stay with Mr. Cyr, Mr. P. was offered visits but according to Ms. Cyr the respondent father only saw the child twice in one year. Ms. Cyr testified that there was no contact from Ms. Smith during that one year period.[9] At the time of trial neither Ms. Baskay or Ms. Cyr were aware of Ms. Smith's whereabouts.

Mr. P. testified however, that after the 1996 paternity determination and court order support payments he began having visits with Salvatore every other weekend. He testified that he would pick the child up from the maternal great grandparents home and bring the child to live with him at the paternal grandparents home which was also his residence. He testified that these visits occurred from 1996 through October of 1998 when he was re-incarcerated. Mr. P. testified that he cared for Salvatore, fed him, gave the child his required medication and bought the child sneakers and clothing. Mr. P. testified that Ms. Cyr did not care for Salvatore for a year, but that the respondent mother took the child back after just one week.

It was undisputed that once Mr. P. was re-incarcerated in October of 1998 the only contact he had with Salvatore Jr. was one court ordered visit in September of 2000.

Salvatore Jr. has been referred twice to a partial hospitalization program due to behavioral issues and psychiatric issues. The child requires daily doses of Respiradol to manage his behavior. He has been

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[9] Ms. Cyr testified that Salvatore Jr. cam to live with her the year he attended kindergarten, she believed it was 1996. Given the child's birth date of February 1, 1992 he would have only been four years old in 1996. It is impossible to determine from the record whether paternity had been established by the time the child, Salvatore, Jr., came to reside with Ms. Cyr.

diagnosed with post traumatic stress disorder, anxiety disorder NOS, and a phonological disorder which has to do with his hearing and speech problems. Salvatore's primary therapist testified that the original trauma inflicted on the child was due to mother's neglect of Salvatore Jr.

TERMINATION ADJUDICATION

The record by clear and convincing evidence reflects the following:

Reasonable efforts to reunify the two children with respondent mother were deemed no longer appropriate on June 19, 2000.

In May of 1999 it was the intent of DCF to reunify the children with Ms. Smith. From May to October of 1999 it appeared that reunification would be possible. It was Ms. Smith who cut off all contact with DCF and the children in October of 1999. Ms. Leonard testified that respondent mother's mother would contact DCF to alert DCF as to where Ms. Smith might be located. Ms. Leonard would investigate. Ms. Leonard did receive a phone number of a gentleman that Ms. Leonard had heard that Ms. Smith was living with. Ms. Leonard called the number several times with no response. Ms. Leonard believed that on one occasion Ms. Smith answered the phone and hung up on Ms. Leonard. When Ms. Smith did reappear at DCF in April of 2000, Ms. Leonard did secure a shelter bed for the then homeless respondent mother. DCF never heard from Ms. Smith again. Ms. Smith never appeared at the shelter.

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[Court discusses adjudication terminating the rights of fathers, Mr. E. and Mr. P.]

Abandonment

Connecticut General Statutes § 17a-112 (j)(3)(A) provides that a ground for termination exists when "(t)he child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child." "Attempts to achieve contact with a child, telephone calls, the sending of cads and gifts, and financial support are indicia of 'interest, concern or responsibility' for the welfare of the child." In re Migdalia M., 6 Conn. App. 194, 208-09, cert. denied., 199 Conn. 809 (1986). If a parent fails to visit a child and lacks any real interaction with the child and shows no concern for the child's welfare then statutory abandonment exists. Id. at 209.

The last contact Ms. Smith had with Salvatore and T. was in October of 1999. Although she reappeared at DCF in April of 2000 she did not se the children. Ms. Smith was made aware of the potential reality that DCF would seek to have her parental rights terminated. She nonetheless failed to follow through with her request for help from DCF.

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[Court discusses adjudication terminating the rights of fathers, Mr. E. and Mr. P.]

Failure to Rehabilitate

Statutory grounds exists to terminate parent rights when: "[the parent] of a child who has been found by the superior court to have been neglected or uncared for in a prior proceeding has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, *considering the age and needs of the child*, such parent

could assume a responsible position in the life of the child..." (Emphasis added) C.G.S. § 17a-112 (j)(3)(B). In analyzing a respondent parent's rehabilitative status the court must look at the status as it relates to the needs of the particular child, and such rehabilitation must be foreseeable within a reasonable time. In re Roshawn P., 51 Conn. App. 44, 54-55 (1998).

Ms. Smith's unknown whereabouts and complete lack of contact with family and DCF since April of 2000, combined with the type of lifestyle she confessed to be living when last seen strongly supports the conclusion that personal rehabilitation is not likely in a reasonable amount of time.

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[Court discusses adjudication terminating the rights of father, Mr. P.]

No ongoing parent / child relationship

In determining whether there is any ongoing parent/child relationship, the court must engage in a two prong analysis. First it must be determined "(t)hat no parent/child relationship exists, and second, the court must look into the future and determine whether it would be detrimental to the child's best interest to allow time for such a relationship to develop." In re Savanna M., 55 Conn. App. 807, 815 (1999), C.G.S. § 17a-112 (j)(3)(D).

Ms. Leonard testified that initially upon placement into foster care Salvatore Jr. talked about his mom all the time. Salvatore prayed that his mom would get housing so that she could take him back. Salvatore stopped talking about his mother and is now asking where he can go to live full time with his maternal great aunt and uncle. It is clear that any parent/child

relationship that had existed between Ms. Smith and Salvatore Jr. has eroded. It is detrimental for Salvatore Jr. to spend even one more day than is absolutely necessary in the limbo of foster care. The reappearance of his mother is doubtful; the chances of her attaining a degree of rehabilitation to such an extent that a parent/child relationship might, in time, be re-established is next to impossible.

T. was only an infant when last in his mother's care. Any parent/child bond that formed has been extinguished as result of respondent mother's protracted absence from T.'s life. It would be ludicrous to allow further time to lapse so that in the unlikely even Ms. Smith resurfaces and positively re-enters T.'s life, a parent/child relationship might someday be possible.

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[Court discusses adjudication terminating the rights of fathers, Mr. E. and Mr. P.]

DISPOSITION

In the dispositional phase of a termination case, the court must consider whether DCF has proven by clear and convincing evidence that 'termination is in the best interest of the child.' It is in both children's best interest to have the respondents' parental rights terminated.

In accordance with C.G.S. § 17a-112(k) the court makes the following findings:

(1) The court must look at the timeliness, nature extent of services offered, provided and made available to the parent and child by an agency to facilitate the reunion of the child with the parents. DCF obviously made efforts to reunify Ms. Smith with the children. It

was on a positive course until Ms. Smith no longer made herself available to DCF, her children or her family.

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[Court discusses disposition in regards to terminating the rights of fathers, Mr. E. and Mr. P.]

(2) This court finds that DCF made reasonable efforts to reunite the parents with the child pursuant to the federal Adoption Assistance and Child Welfare Act of 1980, as amended. For the reasons set forth previously the court finds that DCF offered appropriate services and sufficient time for the respondent parents to reunify with their children.

(3) The terms of any applicable court order entered into and agreed to by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order must also be addressed. Ms. Smith and DCF had agreed to a plan of reunification. Ms. Smith failed to maintain her agreed upon commitment to sobriety, treatment, reliability with visitation and stable housing.

The were no agreed upon court ordered specific steps as to either respondent father.

(4) The feelings and emotional ties of the child with respect to the child's parents, any guardian of the child, and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties must be discussed.

Salvatore Jr. calls his present foster parents mom and dad. He very much wants to go live with his maternal great aunt and uncle who have been identified as permanent resources for the child and have

expressed a desire to adopt Salvatore Jr. Ms. Smith is just a memory to Salvatore. Mr. P. is a biological father who Salvatore Jr. has seen and had contact with only once in two and one half years. Salvatore refused any further visits with his father.

T. was an infant when placed into foster care. He has no emotional ties to either of his biological parents. He is bonded to his foster parents but they are not potential adoptive parents. Terminating the parental rights of Ms. Smith and Mr. E. will make T. eligible for adoption.

(6) The efforts the parent has made to adjust her or his circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child has been discussed previously.

Ms. Smith chose her substance abuse lifestyle over her children. Mr. E. never made any choice regarding T. except to leave Ms. Smith upon learning that she was pregnant with T.

Mr. P. chose to sit in jail for almost two and a half years with only one visit with Salvatore Jr. There were no cards, gifts, telephone calls by Mr. P. to the child or inquiry to DCF regarding the child's welfare. Financial support was forthcoming as a result of a court order support payment that was automatically deducted form any paycheck earned by Mr. P.

(7) The final consideration is the extent to which a parent has been prevented from maintaining a

meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent.

No one or thing, other than Ms. Smith's substance abuse and accompanying lifestyle, is to be blamed for the complete lack of any relationship between herself and her two boys. Mr. E decided to depart the party upon learning of T.'s existence in utero, a decision he has apparently never reconsidered.

Maternal relatives may not have made it easy for Mr. P. to establish and/or maintain a parent/child relationship with Salvatore Jr., but by May of 1999 the child was in non-relative foster care and therefore in a neutral environment. Neither maternal relatives, DCF nor the court made it impossible for Mr. P. to re-establish or continue to be a parent figure to Salvatore Jr. Mr. P. made a conscious decision to cut off all ties with his son. The unreasonableness of that act and its consequences are Mr. P.'s doing and on one else's.

CONCLUSION

Based on the foregoing findings, the court determines that it is in the best interest of both children for a termination of parental rights to enter with respect to the respondent mother and both respondent fathers. Accordingly, the court hereby grants the termination petitions. The court further orders that the Commissioner of DCF is appointed statutory parent for the children. The Commissioner shall file with this court no later than 30 days following the date of judgment a written report of efforts to effect a permanent placement for both Salvatore Jr. and T. and file further reports as are required by state and federal law.